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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1919.

BARTHOLOMEW SULLIVAN, MARGARET THO-  
LEN, JOHN MARTIN ET AL.,  
APPELLANTS,

VS.

JANE KIDD, APPELLEE.

**BRIEF ON BEHALF OF APPELLEE.**

O. H. DEAN,  
H. M. LANGWORTHY,  
R. B. THOMSON,  
R. D. WILLIAMS,  
*Solicitors for Appellee.*

J. E. MADDEN,  
W. D. McLEOD,  
*Of Counsel.*

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**STATEMENT.**

In addition to the statement made on behalf of appellants, we submit the following:

No evidence is preserved in the record, and the case comes to this court on appeal from the District Court of the United States for the District of Kansas, First Division, on the record made solely by the pleadings and the record entries in the court below.

The proceedings were instituted in the District Court of the United States for the District of Kansas, First

Division (Record, 2-4); and the real estate sought to be partitioned was located in Saline County, Kansas (Record, 3, 9), which county is included within the first division of the judicial district for the State of Kansas (U. S. Comp. Stat., Sec. 1067; Sec. 82 Judicial Code). Under the provisions of that section:

"Terms of the District Court for the First Division, shall be held in Leavenworth on the second Monday in October, at Topeka on the second Monday in April, at Kansas City, on the second Monday in January, and the first Monday in October, and at Salina on the second Monday in May."

It is charged in the amended bill of complaint (Record, 8):

"That the determination of this controversy depends, materially, upon the construction to be placed upon the existing treaties between the United States of America and the Kingdom of Great Britain and Ireland which affect the tenure and disposition of real property among the citizens and subjects of said signatory powers."

It is further alleged that on January 20, 1915, one Peter Martin, a widower and unmarried, died at Osawatimie, Kansas, intestate and without issue, and at the time of his death and prior thereto, he was a citizen and resident of Saline County, Kansas, owning the real property sought to be partitioned by these proceedings.

That the said Peter Martin left surviving him brothers and sisters, or descendants of brothers and sisters, among whom was Margaret Ingoldsby, a sister.

The bill of complaint further alleges (Record, 9, 10):

"That subsequent to the death of the said Peter Martin and on or about the 28th day of July, 1916, the said Margaret Ingoldsby died at her home in the township of Sheffield, County of Lennox-Addington, Province of Ontario, Dominion of Canada, and that at the time of her death she, the said Margaret Ingoldsby, was a citizen and resident of said township, county, province and dominion, and a non-resident alien of the United States of America and State of Kansas, that in her last will and testament which was duly filed and probated in his Majesty's Surrogate Court sitting in and for said county and province, the said defendant, Jane Kidd, was duly named as sole legatee and devisee, a copy of said last will and testament being hereto annexed marked Exhibit A and made part of this amended bill of complaint, by virtue whereof the right of inheritance of the said Margaret Ingoldsby and her said legatee and devisee are determined by the conventions of 1899 and 1902, entered into by and between the Governments of His Britannic Majesty and the United States of America and affecting the tenure and disposition of real and personal property between the citizens and subjects of said signatory powers.

\* \* \* \* \*

That under and by virtue of the laws of the State of Kansas complainants herein are the owners in fee simple of an undivided one-sixth of the real estate hereinbefore described, and that the said defendants, other than the said Jane Kidd, as sole legatee and devisee of the said Margaret Ingoldsby, deceased, Joseph Martin, as administrator of the estate of the said Peter Martin, deceased, and John Martin the son of Joseph Martin, are the owners, in fee simple, of the remaining five-sixths of said real estate."

In the prayer of the bill of complaint is included the following (Record, 11):

"That the court decree that the complainants herein are the owners in fee simple of an undivided one-sixth of said real estate; that said real estate be sold and that the proceeds derived from the judicial sale thereof be divided as may be consistent with said rights and the principles of equity and that it be further decreed that the said Jane Kidd, Joseph Martin, administrator, and John Martin, the son of Joseph Martin, have no right, title, claim, estate or interest in, to or upon said real estate or any part thereof of any kind or character whatsoever, and for such other and further relief as to the court may seem equitable and just including judgment for costs."

The last will and testament of Margaret Ingoldsby, which the bill of complaint recites is annexed thereto and made a part thereof, is not included in the record.

The original Bill of Complaint (Record, 4), charges that Margaret Ingoldsby was at the time of the death of Peter Martin, a **subject** of His Britannic Majesty.

In the course of the proceedings an application for a decree *pro confesso* was filed in the District Court at Salina, Kansas (Record, 19), but so far as the record shows no decree *pro confesso* was ever taken.

Thereafter on March 11, 1918 (Record, 20-23), a decree was entered in said cause undertaking to define the interests of the parties in the real estate in question and ordering a partition and sale of said real estate.

Appellants in their brief state (p. 2):

"Upon March 11, 1918, at Wichita, Kansas, and at the March Term of said court (Tr. 20-23),

a decree was entered, in which decree the court found that the said Jane Kidd had failed to answer or otherwise plead to the amended bill," etc.

It does not appear from the decree that said order was made at Wichita, and nowhere in the record does it appear that said order was made at Wichita, except on statement of counsel in the application for order of distribution contained on page 30 of the record.

The decree recites (Record, 20) that "this cause came on to be heard at this term," but does not say what term, nor does it appear at what term of court the decree was taken.

The terms of the District Court were held at Wichita for the *Second* Division of the District Court of Kansas, only, and this proceeding was pending in the *First* Division of the District Court (U. S. Comp. Stat., Sec. 1067; Judicial Code, Sec. 82).

Thereafter the real estate was sold pursuant to the decree of the court (Record, 25), and in the order confirming sale (Record, 28), made at Kansas City in the First Division of said District Court, on April 23rd, it is distinctly provided (Record, 29):

"It is further ordered jurisdiction of this cause is expressly reserved for the purpose of fixing the compensation of the special master and solicitors for the parties, ordering payment made, distributing the purchase price and to make any and all further orders herein as equity and justice may demand."

Thereafter an order making allowances and for the disbursements of proceeds of Master's sale was made May



13th, 1918, at Salina, Kansas, by which decree the court made an order of distribution, and, after providing for the payment of expenses and costs of sale and taxes assessed against said real estate, the court provided (Record, 32):

"and that of the sum then remaining, a one-seventh be retained by said Special Master, subject to the further order of the court and that the balance thereof be distributed among the parties to this cause, complainant—and defendant—in this action, to-wit:

Bartholomew Sullivan and Margaret Tholen, a one-twelfth ( $1/12$ ) each,

John Martin, Joseph Martin and Anna Martin, a one-sixth ( $1/6$ ) each,

Joseph Martin, purchaser of the undivided interest of Patrick H. Martin, defendant, a one ( $1/66$ ) sixty-sixth,

Bernard J. Martin, Edward F. Martin, Leo R. Martin, J. Vincent Martin, Michael H. Martin, Thomas C. Martin, Rachel I. Martin, Mary A. Standard, Anne F. Martin, and Julia F. Martin, a one ( $1/66$ ) sixty-sixth each.

Joseph Hall, James Hall, Ellen Hall, Mary Hall, Thomas Hall, Winnifred Hall, Gertrude Hall and William Hall, a forty ( $1/48$ ) eighth each.

And it is further ordered that the said special master issue proper vouchers in payment of the interests as above set forth and the court hereby retains jurisdiction of this cause for the purpose of such further and other orders in the premises as may appear equitable and just."

No exception is taken to the action of the court in withholding one-seventh of the net proceeds of the sale (being the amount to which Jane Kidd would be entitled as a devisee of the said Margaret Ingoldsby, if the said

Margaret Ingoldsbly is entitled to participate as an heir at law of the decedent).

Endorsed upon this decree appears the following (Record, 32):

"O. K.

Burch, Litwisch & Royce,

Attys. for Joseph Martin et al.

Geo. F. Beatty,

Atty. for Bartholomew Sullivan, et al. and  
John Martin et al."

Thereafter at the instance of the Honorable C. L. N. Pearson, British Consul, at St. Louis, Missouri (Record, 34), the court allowed an intervening petition to be filed on behalf of Jane Kidd, appellee, in order that further consideration might be given to her rights in the premises, it appearing that on account of serious illness, said Jane Kidd was unable to be present or arrange for the presentation of her rights at the time sale was made (Record, 36).

There was also filed on behalf of Jane Kidd a petition for rehearing (Record, 32-33).

Thereupon the case was heard upon the intervening petition of Jane Kidd, and the court found that Jane Kidd is the sole devisee of Margaret Ingoldsbly, who was a sister of Peter Martin, deceased, and that the said Margaret Ingoldsbly died on or about the 28th day of July, 1916, after the death of said Peter Martin, and that under the law and treaties in force and effect at said time, the said Margaret Ingoldsbly was entitled to inherit from the said Peter Martin as one of his heirs a

one-seventh interest in and to the real estate referred to in the bill of complaint, and that the said Jane Kidd as the sole legatee and devisee of said Margaret Ingoldsby is entitled to receive the share in the net proceeds of the sale of said real estate, which said Margaret Ingoldsby would have received if living, and it was ordered by the court that after the payment of the fees, expenses, costs and taxes provided for in the order of the court entered on May 13, 1918, the special master be directed to pay to counsel for Jane Kidd one-seventh of the proceeds of the sale of the real estate, then remaining in his hands, which said sum was by said order of the court directed to be retained by said special master subject to the future order of the court (Record, 34, 35).

The only questions presented by appellants are:

1. Whether the court properly permitted an intervention on behalf of Jane Kidd.
2. Whether the court was correct in holding that under the laws and treaties in force and effect at the time of the death of Peter Martin, deceased, Margaret Ingoldsby was entitled to inherit from the said Peter Martin as one of his heirs.

## BRIEF AND ARGUMENT.

### I.

**The court properly permitted the filing of the intervening petition on behalf of the appellee.**

It is argued by appellants that (page 5) :

"The application for leave to file an intervening petition was not filed until June, 1919, at Kansas City, Kansas. The order granting leave to file intervening petition was made on the 19th of June, 1918. The decree adjudicating that Jane Kidd had no interest in the premises was made and filed upon March 11, 1918, at Wichita during the March Term. Consequently the court did not have authority to grant leave to file the intervening petition."

As heretofore pointed out in the statement of facts, the proceedings were pending in the first division for the District of Kansas, in which division the land sought to be partitioned is situated. That is, the land was situate in Saline County, which is included in the territory which the First Division embraces (Sec. 1067, U. S. Comp. Stat.; Sec. 82, Judicial Code). Wichita is in the Second Division. It does not appear from the record that the decree of March 11, 1918, was entered at Wichita, nor that it was entered at the March term, as contended by counsel (Record, 20-23). Section 82 of the Judicial Code does not provide for a March Term to be held anywhere in the first division, and if a decree was

entered in the Second Division at Wichita, then the court was without jurisdiction to enter the decree at all. The presumption being in favor of the regularity of the proceedings of the court below, it must be presumed that the decree was duly entered in the First Division during one of the terms of that division. By the terms of that decree, the court retained jurisdiction of the cause for certain purposes (Record, 23), and at whatever term of court the decree was entered, it is obvious that the term was continued for further orders in the case.

In case of *Walker et al. v. Moser et al.*, 117 Fed. 230, decided by the Circuit Court of Appeals for the Eighth Circuit, which includes the District of Kansas, it was held that (L. c. 233):

"This court will not presume that the Circuit Court has committed errors not made to appear, nor that it has falsified its records."

In that case it was contended that the decision on the motion for a new trial came too late because it came after the term had ended in which the verdict was rendered.

It was held that the jurisdiction of the court over the cause and parties continued after such term, if during the term a question respecting the motion is entertained and allowed and held open for further consideration.

It does not appear in the case at bar that the term in which the partition decree was entered had ended before the orders complained of were entered; but even if it did, the action of the court in retaining jurisdiction

of the case was sufficient to give it ample jurisdiction to permit intervention.

Thereafter under the order confirming the sale made on April 23, 1918, the court expressly reserved jurisdiction of the cause for the purpose of distributing the purchase price and "to make any and all further orders herein as equity and justice may demand" (Record, 29). Here again it is to be presumed that the term of court was continued for further orders in the case, and that under the reservation of jurisdiction, the court had ample power to make such further orders as equity and justice may require.

In the order made on May 13th, 1918 (Record, 32), the court retained jurisdiction of the cause by its decree for the purpose of such further and other orders in the premises as may appear equitable and just, and by that decree retained one-seventh portion of the net proceeds of the sale, obviously for the purpose of holding open the question as to whether appellee, Jane Kidd, was entitled to such proceeds. No exception was taken to the action of the court in withholding this sum or in retaining jurisdiction of the cause.

It is provided in the equity rules (Rule 37) among other things:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention must be in subordination to, and in recognition of, the propriety of the main proceeding."

Under this provision of the equity rules, the trial court very properly permitted an intervening petition to be filed on behalf of Jane Kidd pursuant to the suggestion and request of the British Consul.

We submit, therefore, that there is no merit in the contention that the trial court erred in permitting intervention.

## II.

**Under the treaties in force and effect between this country and the United Kingdom of Great Britain and Ireland, the appellee is entitled to share in the proceeds of the partition sale.**

As we understand the argument on behalf of appellants, no contention is made that Jane Kidd is not entitled to take the interest of Margaret Ingoldsby by devise, provided that Margaret Ingoldsby was entitled to inherit as one of the heirs of the deceased, Peter Martin. It is well settled that by the common law that an alien can take lands by purchase, and that there is no distinction whether the purchase be by grant or by devise.

In the early case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch's Reports, 603, 1 c. 619, Mr. Justice Story, stated the rule as follows:

"It is clear by the common law, that an alien can take lands by purchase, though not by descent; or in other words he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time.

11 Hen. 4, 26. 14, Hen. 4, 20. Co. Litt. 2 b. Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests in the alien."

The common law is in force in the State of Kansas, insofar as it has not been modified (Sec. 1129, Gen. Stat. of Kansas, 1915), and as there is no claim that the common law has been modified in this respect, the only question is whether Margaret Ingoldsby who died subsequent to the death of the decedent, Peter Martin, was entitled to inherit under the treaties in force and effect between the United States and the United Kingdom of Great Britain and Ireland.

In the case of *Johnson v. Olson*, 92 Kansas, 819, 1. c. 822, the court expressly held that the common law rule is now in force in the State of Kansas.

The only question presented, therefore, is whether Margaret Ingoldsby, a sister of the decedent, was entitled to inherit as such, and receive her proportionate share of the proceeds of the partition sale.

Prior to the amendment of the Kansas State Constitution in 1888 (*Johnson v. Olson*, 92 Kan. 819, 1. c. 821), a non-resident alien had the same right to inherit as a resident and citizen of Kansas.

In the case of *Johnson v. Olson*, 92 Kansas, 1. c. 821, the court said:

"Originally aliens and citizens were upon an equality in Kansas so far as the inheritance of property was concerned."



Consequently, except for the amendment to the state constitution, Margaret Ingoldsbly, a sister of the decedent, would have been entitled to inherit (*State of Kansas v. Ellis*, 72 Kan. 285).

It is, however, the contention of the appellee that, regardless of the laws and decisions of the State of Kansas at the time of the death of Peter Martin, under the treaties in force and effect between the United States and the United Kingdom of Great Britain, Margaret Ingoldsbly was entitled to inherit a one-seventh interest of the real estate belonging to Peter Martin, at the time of his death and situate within the State of Kansas, and that she having inherited such one-seventh interest, that interest was acquired by Jane Kidd, the appellee, by devise, pursuant to the terms of the last will and testament of the said Margaret Ingoldsbly.

The "Convention as to Tenure and Disposition of Real and Personal Property," concluded March 2, 1899, between the United States of America and the United Kingdom of Great Britain and Ireland, clearly entitles Margaret Ingoldsbly to inherit a one-seventh interest in the land in question, unless such right is denied by Article IV of that treaty.

The preamble to this treaty contains the following (Vol. I, Malloy's Compilation of Treaties, etc. between The United States of America and other powers, page 774):

"The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, desiring to improve the con-

dition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories of the other, as well as to authorize the representation of deceased persons by the Consuls of their respective nations in the settlement of estates, have resolved to conclude a convention for those purposes and have named as their plenipotentiaries:"

Article I of that treaty is as follows:

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn."

Article IV of that treaty provides as follows:

"The stipulations of the present convention shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such colony or foreign possession by Her Britannic Majesty's Representative at Washington to the United States Secretary of State, within one year from the date of the exchange of the ratifications of the present convention.

It is understood that under the provisions of this Article, Her Majesty can in the same manner give notice of adhesion on behalf of any British Protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the Convention of the 4th of June, 1878, between Great Britain and Turkey.

The provisions of this Convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty making power of the United States."

It will be observed that the purpose of the treaty, as set forth in the preamble, is a desire to improve the conditions of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories of the other.

It is conceded that Margaret Ingoldsbly at the time of the death of Peter Martin was "a subject of the United Kingdom of Great Britain and Ireland" (Record, 4, 36), and that the real estate is located within the United States.

It is apparently the contention of appellants that no notice was given on behalf of the Dominion of Canada of its acceptance of the treaty, and that therefore under the terms of Article IV of the treaty, Margaret Ingoldsbly, who was a resident of the Dominion of Canada, is excluded from the terms of Article I thereof.

This contention, we submit, ignores not only the precise terms of the treaty, but also the general rules of construction in reference to treaties.

It will be observed that Article IV of the treaty does not provide that the stipulations of the treaty shall not be applicable to any of the *residents* of the Colonies or foreign possessions of Her Britannic Majesty, unless notice to that effect shall be given; but merely provides that the stipulations of the treaty shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty, unless such notice has been given.

The preamble recites that the purpose is to improve the condition of the "citizens and subjects of each of the respective countries," and Article I of the treaty specifically provides for inheritance of real property by "citizens and subjects" of each of the other countries.

The treaty does not undertake to distinguish between *residents* of different portions of the United Kingdom of Great Britain or of the United States; but by the terms of the treaty the benefits thereof extend to all "citizens and subjects" of each of the respective countries without regard to their place of residence. While the provisions of Article IV are somewhat vague, there is nothing in the terms thereof which excludes the citizens and subjects of either of the contracting parties by virtue of their place of domicile or residence. The most that can be said for that Article of the treaty is that it possibly excepts some of the territory of each of the contracting parties.

The last paragraph of Article IV makes it clear that the restriction is intended to be *territorial* and not based upon the place of residence of the citizen or subject of either of the contracting parties.

A subject of the Kingdom of Great Britain is *non* the less a subject because he may be residing in Canada or may be residing in one of the colonies or even in a foreign country. It clearly was not the intent of the treaty to prevent a subject of the Kingdom of Great Britain, who might be residing in Canada, from the benefit of such treaty, while extending the benefits of such treaty to a subject of Great Britain, who might be residing in France, Germany, The United States, or in any other foreign country.

It may be that the intention was to exclude the *territory* of non-adhering colonies of the United Kingdom of Great Britain and the *territories* occupied and governed by the United States beyond the seas, unless notice were given, as provided by Article IV. Under such construction, a citizen of the United States would not be permitted to inherit lands situated in Canada in the absence of such notice, and a subject of the United Kingdom of Great Britain would not be entitled to inherit lands in the Philippine Islands, in the absence of such notice, but this does not prevent a subject of the United Kingdom of Great Britain, wherever domiciled, from inheriting lands situated in the United States, *nor* does it prevent a citizen of the United States from inheriting land situated in England, wherever he may be domiciled.

This construction of Article IV is a sensible construction, because it might very well be that neither of the contracting parties desired to have the subjects or citizens of the other inherit lands situated in their colonies or territories beyond the seas, except upon such consent of such particular colonies or possessions.

The very object and purpose of the treaty, however, being to improve the conditions of the citizens and *subjects* of each of the others in relation to tenure and disposition of real and personal property, there could be no possible reason for making a distinction between a subject or citizen of the other who might be temporarily or permanently residing in some particular territory.

The rule is well settled that treaties must receive a fair and liberal interpretation, and a sensible construction, which will accomplish the obvious intent of the parties is to be preferred as against one which is contrary to the obvious spirit and intent.

In 1 Kent's Commentaries, 174, the learned author says:

"Treaties of every kind when made by the competent authority are as obligatory upon nations as private contracts are binding upon individuals, and they are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to private contracts."

This rule has been consistently adhered to and repeatedly announced by this court.

In the case of *Shanks v. Dupont*, 3 Peters, 262, Mr. Justice Story, in discussing the 9th article of the John Jay treaty of 1794 with Great Britain, said (p. 249):

"Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is therefore within the words of the treaty. Why ought she not also to be held within the spirit and intent? It is said that the treaty meant to protect the rights of British subjects, who were not also American citizens; but that is assuming the very point in controversy. If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted? The object of the British government must have been to protect all her subjects holding lands in America from the disability of alienage in respect to descents and sales."

In the case of *Haucuttin v. Lyndam*, 100 U. S. 483, 1 c. 487, this court had under consideration a treaty between this country and Switzerland in reference to the inheritance of real estate. In discussing the treaty, Mr. Justice Swayne, speaking for the court said:

"Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks v. Dupont*, 3 Pet. 242. Such is the settled rule in this court."

Likewise in the case of *Geofroy v. Riggs*, 133 U. S. 258, the court had under consideration a treaty between this country and France in reference to the inheritance of real estate by a citizen of France in the District of Columbia. The court again announced the same

principle of construction in the following language (p. 271):

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of its rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hausenstein v. Lynham*, 100 U. S. 483, 487. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities."

That decision is of special significance in the case at bar, because under the precise terms of the treaty, inheritance of real estate in the United States was permitted only in "states of the union" and the land in question was situated within the District of Columbia, which is not one of the states.

The court held, however, that under the principles of construction announced by it, the language of the treaty would be construed to include real estate located



in the District of Columbia, although it was not, strictly speaking, one of the states of the Union.

In the case of *In re Ross, Petitioner*, 140 U. S. 453, the court had under consideration a treaty between this country and Japan. The court said (l. c. 475):

"Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and, also, all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties."

Again in the case of *United States v. Texas*, 162 U. S. 1, l. c. 36, the same rule was announced and applied. The court said:

"Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. 1 Kent Com. 174."

There can be no doubt that the terms "citizens and subjects" and "citizens or subjects" used in the treaty under consideration, are used in the broader sense, based upon nationality and permanent allegiance to the government, rather than in the sense of mere domicile.

It is said that the term "British subject" means any person who owes permanent allegiance to the Crown.

Dicey *Conflict of Laws*, 2d Ed. 1908, pages 166-191.

In the case of *United States v. Wong Kim Ark*, 169 U. S. 649, this court had under discussion the meaning of the term "citizen." In the course of the opinion, the court said (l. c. 656, 657) :

"In *Udny v. Udny* (1869), L. R. 1 H. L. Sc. 441, the point decided was one of inheritance, depending upon the question whether the domicile of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: 'The question of naturalization and of allegiance is distinct from that of domicile.' p. 452. Lord Westbury, in the passage relied on by the counsel for the United States, began by saying: 'The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status.'

\* \* \* \* \*

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: 'By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality.' Cockburn on Nationality, 7."

See also:

*MacKenzie v. Hare et al.*, 239 U. S. 299, 311.

*Harding v. Standard Oil Co.*, 182 Fed. 421.

*Hammerstein v. Lync*, 200 Fed. 165.

Clearly, Margaret Ingoldsby was a subject of the United Kingdom of Great Britain, because she owed allegiance to that government, and as no attempt is made in the treaty to confine her rights because of domicile in any particular part of the kingdom, she is entitled to the benefit of the provisions contained in Article I.

The same is true with respect to citizens of the United States. Their rights under the treaties are fixed regardless of the place of their particular domicile or residence.

While it may be that this treaty is somewhat obscure in its meaning (*Doe v. Roe*, 4 Penn. (Del.) 398; 55 Atl. 341), yet it cannot be said that either under the precise terms of the treaty or under a proper interpretation thereof it was intended that a subject of Great Britain who happened to be domiciled in Canada, should

be excluded from the benefits of Article I thereof, because notice had not been given as provided in Article IV. This article on its face purports to be a limitation as to territory only, and not as to the citizens and subjects of either party because of residence.

### III.

**Under the most favored-nation clause of the treaty, Margaret Ingoldsby was entitled to inherit.**

Article V of the treaty under consideration provides as follows:

"In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation."

There was evidently some purpose for putting this provision in the treaty.

Most favored nation clauses in treaties have been variously construed, and it is perhaps the rule that where they relate to commercial concessions, such a clause contained in a treaty does not require the granting of similar concessions to those granted to other countries, unless the concessions are reciprocal. But where the treaty is of a political nature, and is one of amity and friendship, and for the purpose of bettering the political conditions of citizens and subjects of each of the contracting parties, the most favored-nation clause is clearly applicable.

In the case of *Wyman v. McEroy*, 191 Mass. 276, the Supreme Court of Massachusetts had under consideration the meaning of the most favored-nation clause of a treaty similar to the one under consideration here. The court said (l. c. 277) :

"Under the most favored nation clause reliance is had upon the provisions of article 9 of the treaty of 1833 between the Argentine Republic and the United States, which read as follows: 'If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' See also the treaty between Costa Rica and the United States of 1851, Article 8."

The court held that under the most favored nation clause contained in a treaty with Russia, the foregoing provision in the treaty with the Argentine Republic would apply to a Russian citizen dying in Massachusetts and leaving heirs in Russia.

A clause of this character was recently before this court in the case of *McGovern v. Phila. & Reading Railroad*, 235 U. S. 389. Inasmuch as the decision turned upon other questions the court did not do more than to mention the matter in the following language (l. c. 397) :

"It is suggested rather than urged that the case is not properly here on direct appeal. But the right of direct appeal is based on the ground,

among others, that the construction and application of the treaty between the United States and Great Britain and Ireland are involved in the case, the favored-nation clause of which give the residents and citizens of Great Britain and Ireland the same rights as those of Italy, and that by a treaty between the latter and the United States its citizens are entitled to exactly the same rights as citizens of this country in the courts of this country, although the citizens of Italy may be residing abroad."

In that case, the concessions granted were of a political rather than of a commercial nature.

The same is true in the case of *Lobrasciano's Estate*, 77 N. Y. Suppl. 1040. In that case the court said (l. c. 1045):

"While the forms of expression in the numerous treaties of the United States widely differ, nevertheless governments in their negotiations acted according to well-defined principles, and had in view specific objects, and, although the language varies in the different treaties, the privileges and prerogatives given and obtained in respect to the same subject are in furtherance of the same common principle and object. So, where provisions are found in one treaty of doubtful import, we are entitled to look to the provisions of treaties with other nations, on the same subject, which are free from doubt, or which, having been construed, will aid us in determining the true spirit and meaning of that which is in doubt."

See also *In re Fattosini's Estate*, 67 N. Y. Suppl. 1119, which is to the same effect.

It is obvious from an examination of the treaties which this country has concluded with the various coun-

tries, that the general object and purpose thereof is to remove the common law disability which prevents an alien of one country from inheriting under the laws of the other, and that such being the general purpose and object of other treaties, the treaty between the United States and the United Kingdom of Great Britain should under the most-favored nation clause be so construed as to attain the object of that treaty, and at the same time to grant to the subjects of the United Kingdom, the same privileges that are granted to citizens and residents of other foreign countries.

It will be observed that Article V of the treaty under consideration, provides that "in all that concerns the right of disposing of every kind of property, *real or personal*, citizens or *subjects* of each of the contracting parties, shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation." There are many treaties which this country has concluded with other nations which accord to the citizens and subjects of each of the contracting parties the right of inheriting real estate located in the boundaries of the other.

In the "Treaty of Friendship, Commerce, and Navigation" concluded in the year of 1887, between this country and Peru, it is provided in Article XI thereof as follows (2 Malloy on Treaties, Conventions, etc., p. 1434):

"The citizens of either of the high contracting parties shall have the full powers and liberty to dispose of their personal and real estate and effects

of every kind and description, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their heirs or representatives, being citizens of the other party, shall succeed to the said personal and real estate and effects, whether by testament or *ab intestato*, and may take possession of the same themselves or by others acting for them, and dispose of the same at their pleasure, paying such dues only as the citizens of the country, wherein said estate and effects may be, shall be subject to pay in like cases."

Similar favor provisions are contained in the following treaties:

Treaty with Austria-Hungary, concluded May 8, 1848, Article II (1 Malloy on Treaties, Conventions, etc., p. 34).

Treaty between this country and Brazil, concluded December 12, 1828, Article XI (1 Malloy on Treaties, Conventions, etc. 136).

Treaty between this country and the Independent State of The Congo, concluded January 24, 1891, Article II (1 Malloy on Treaties, Conventions, etc., p. 329).

Treaty between this country and Dominican Republic, concluded February 8, 1867, Article V (1 Malloy on Treaties, Conventions, etc., p. 405).

Treaty between this country and Guatemala, concluded March 3, 1849, Article XI (1 Malloy on Treaties, Conventions, etc., p. 864).

Treaty between this country and Hesse, concluded March 26, 1844, Article II (1 Malloy on Treaties, Conventions, etc., p. 947).

Treaty between this country and Italy, concluded February 26, 1871, Article XXII (1 Malloy on Treaties, Conventions, etc., p. 976).



Treaty between this country and Nassau, concluded May 27, 1846, Article II (2 Malloy on Treaties, Conventions, etc., p. 1231).

Treaty between this country and Orange Free State, concluded December 22, 1871, Article III (2 Malloy on Treaties, Conventions, etc., p. 1311).

Treaty between this country and Paraguay, concluded February 4, 1859, Article X (2 Malloy on Treaties, Conventions, etc., p. 1367).

Treaty between this country and Portugal, concluded August 22, 1840, Article XII (2 Malloy on Treaties, Conventions, etc., p. 1457).

Treaty between this country and the two Sicilies, concluded October 1, 1855, Article VII (2 Malloy on Treaties, Conventions, etc., p. 1817).

Treaty between this country and Venezuela, concluded January 20, 1836, Article XII (2 Malloy on Treaties, Conventions, etc., p. 1834).

Treaty between this country and Wurttemberg, concluded April 10, 1844, Article II (2 Malloy on Treaties, Conventions, etc., p. 1893).

It is of special significance that in the treaty between this country and Italy above referred to, it was thought sufficient to provide simply that (1 Malloy on Treaties, Conventions, etc., p. 976):

"As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation."

Likewise, in the case of the treaty with the Independent State of The Congo, above referred to, it was thought sufficient to provide simply (1 Malloy on Treaties, Conventions, etc., p. 329):

"In all that concerns the acquisition, succession, possession and alienation of property, real and personal, the citizens and inhabitants of each of the High contracting Parties shall enjoy in the territories of the other all the rights which the respective laws accord or shall accord in those territories to the citizens and inhabitants of the most favored nation."

Under the two foregoing treaties above referred to, the whole subject was considered covered by the most favored nation clause. It therefore seems perfectly clear that the most favored nation clause contained in Article V of the treaty between this country and the United Kingdom of Great Britain and Ireland is itself amply sufficient to secure to Margaret Ingolsby the right to inherit as one of the heirs of Peter Martin. It may very well be that the terms of Article V of the treaty containing the most favored nation clause were considered sufficient so that it was not necessary under any consideration to give notice as provided by Article IV of that treaty.

It is inconceivable that with the rights of inheritance which are accorded to the citizens and subjects of other nations scattered over the face of the world, it should be the intention to deny a similar right to subjects of the United Kingdom of Great Britain, because they happen to be residents of our closest neighbor, the Dominion of Canada. Whatever may be said as to the proper interpretation of Article IV of the treaty between this country and the United Kingdom of Great Britain, certainly under the provisions of Article V containing the most favored nation clause, the judgment of the trial court was correct.

In conclusion, we submit that the decision of the trial court was strictly in accordance with the terms of the treaty in effect between this country and the United Kingdom of Great Britain and Ireland, and was in accordance with the principles of equity and justice which the complainants below invoked at the time of filing their bill of complaint.

Perhaps, under strict rules of international law, the fact that Margaret Ingoldsbj was, by natural laws of succession, entitled to share in this estate with her blood kin, is not a matter for consideration, but we submit that the courts of this country will not by a strict and extreme interpretation of the treaties existing between this country and another country with which it is upon most friendly terms, deprive a subject of that country of rights which it was obviously intended they should be permitted to enjoy.

We respectfully submit that the judgment of the trial court should be affirmed.

O. H. DEAN,  
H. M. LANGWORTHY,  
R. B. THOMSON,  
R. D. WILLIAMS,  
*Solicitors for Appellee.*

J. E. MADDEN,  
W. D. McLEOD,  
*Of Counsel.*